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#38

Steven Arita
Senior Coordinator

February 18, 2004

Mr. Craig J Wilson, Chief
TMDL Listing Unit
Division of Water Quality
State Water Resources Control Board
PO Box 100
Sacramento, CA 95812-0100

Subject: Western States Petroleum Association Comments on State Water Resources Control Board's Draft Policy for Developing California's Clean Water Act Section 303(d) List and Draft Functional Equivalent Document.

Dear Mr. Wilson,

The Western States Petroleum Association (WSPA) is a non-profit trade association of companies that produce, transport, refine and market petroleum and petroleum-based products throughout the six western states.

WSPA appreciates the opportunity to provide comments on the SWRCB's draft 303(d) List policy, and in particular, would like to express our thanks and appreciation for providing the public an additional week to submit written comments.

As you are aware, impaired water quality issues, particularly the 303(d) listing and delisting requirements as well as TMDL development and implementation issues are very important to WSPA and its members. In that regard, WSPA strongly commends the SWRCB for taking the initiative to develop a 303(d) Listing Policy so that Regional Board determinations and inclusion of water bodies on the 303(d) List are done through consistent implementation of standardized criteria, guidance and processes.

WSPA has reviewed the draft 303(d) Functional Equivalent Document (FED), and have the following comments:

1. Issue 1 – Scope of the Listing/Delisting Policy:

WSPA supports the recommendation to incorporate guidance on listing/delisting factors into the 303(d) Policy. Clearly the need for statewide guidance and criteria is long overdue. Although

WSPA understands the SWRCB's recommendation to focus only on listing and delisting factors, and not to incorporate additional guidance relative to beneficial use designation and de-designation activities, however, WSPA does believe the SWRCB should begin development of a statewide Policy on Beneficial Use Determination Guidelines and Criteria. Clearly, the need to evaluate whether current beneficial uses are appropriate will not only better define which water bodies are in need of immediate action, but also avoid the expenditure of limited resources and budget funds on water bodies whose beneficial uses are inappropriate to begin with.

2. Issue 2 – Structure of the Section 303(d) List:

WSPA disagrees with the SWRCB's recommendation of Alternative 5, which is to focus the structure of the Section 303(d) list to only one list – the 303(d) list. This action will automatically define as impaired, those water bodies where, 1) impairments are undetermined (the toxicity is unknown), 2) water bodies for which insufficient data exists to support the determination of an impairment, and 3) water bodies for which the water quality standards are not appropriate. Based on the structure of the 2002 list, this action alone, will result in an estimated 300+ additional water bodies to be placed on the 303(d) list, this is on top of the estimated 200 that were added to the 303(d) list in 2002.

WSPA urges the SWRCB reconsider their recommendation and instead consider Alternative 2. WSPA believes it is more appropriate for the SWRCB to categorize those water bodies, which lack sufficient monitoring data, and/or documentation (as described above) and should instead be placed on a "Watch or Planning List". This approach is not only consistent with the current California 2002 303(d) List structure, but is also consistent with the recommendations by the National Academy of Sciences (NAS, 2001).

WSPA recommends the SWRCB reconsider their recommendation and instead adopt Alternative 2.

3. Issue 3 – Weight of Evidence for Listing and Delisting:

WSPA strongly supports the SWRCB's recommendation of Alternative 1. The inclusion of a Weight of Evidence approach for listing and delisting is critical to ensuring there is consistency among local Regional Boards when determining whether water bodies are impaired or not. As noted during the public workshops, there was extensive discussion regarding the issue of Weight of Evidence procedures as well as other criteria and guidance on ensuring data quality and validity. WSPA believes it is critically important that such data quality and weight of evidence requirements be incorporated in the Policy to ensure that California's limited resources are focused on those water bodies truly impaired and that should be addressed immediately. It would also ensure that for those water bodies for which there exists lack of credible data or uncertainty, limited resources are not spent unnecessarily.

WSPA supports the SWRCB's recommendation of Alternative 1.

4. Other Comments:

- **Use of "vague" listing factors and use of Pooled Data:**

WSPA is concerned with certain provisions in the draft policy that would incorporate "vague" evaluation criteria into the policy. We believe this is counter to the goal of a statewide listing policy which is to provide a consistent basis for listing that everyone will understand and lead to truly impaired waters being placed on the 303(d) list. For instance, a health advisory (Listing factor 3.1.4) is only an indicator of impairment for which a "pollutant" should be identified prior to listing. Further, Section 3.1.6 specifically says that a water segment may be listed for toxicity alone, without a pollutant being identified. Again, WSPA believes that such a segment should not be on the 303(d) list until a pollutant has been identified. WSPA also believes that Listing factors 3.1.7 (Nuisance), 3.1.8 (Adverse Biological Response), 3.1.9 (Degradation of Biological Populations and Communities), and 3.1.10 (Trends in Water Quality) are more appropriate as listing factors for the 305(b) list. Furthermore, listing factor 3.1.11 (Alternate Data Evaluation) should be deleted or at a minimum modified. It will only encourage attempts to list water segments even though no specific pollutants have been identified. That is how our list has grown so large with many segments listed even though pollutants have not been identified. Until a "pollutant" has been identified, the above factors should not be used for 303(d) listing.

Further WSPA has concerns with the data quantity assessment process in 6.2.5.6 (Aggregation of Data by Reach/Area) Chapter 6, Policy Implementation. That provision allows water bodies to be listed based on "pooled data". As currently written, a water body could be placed on the 303(d) list based on water quality in adjoining water segments. WSPA believes each reach should be evaluated independently using data quality and weight of evidence requirements as we have noted above.

Although we do not believe that the use of the above factors is appropriate for placing water segments into the 303(d) list, if a "planning/watch" list were incorporated into this policy as has been previously considered in the July, 2003 draft, all these factors could be used to place water segments into such a list where the appropriate monitoring would be undertaken to identify "pollutants" and to verify the appropriateness of placing the water segment on the 303(d) list.

WSPA urges the SWRCB to incorporate a "planning/watch" list into the policy and modify the policy to use the above noted listing factors to place water segments on such a "planning/watch" list.

- **Re-Evaluate 2002 303(d) List:**

While WSPA understands the budgetary and resource limited challenges the SWRCB continues to face, we do urge the Board to allocate available resources towards re-evaluating water bodies on the 2002 303(d) list. As WSPA and others testified during the public workshop, many 303(d) listings were made on the 1998 and 2002 303(d) lists, which may be inappropriate due to inadequate data quantity and quality as well as inappropriate water quality standards and beneficial use designations.

WSPA urges the SWRCB to require re-evaluation of water bodies identified on the 2002 303(d) list.

We also would like to point out that it was noted during the workshops, some commenters raised the issue of the need to implement the "Precautionary Principle" into listing decisions. WSPA believes that the Precautionary Principle is an extreme form of precaution that fails to base environmental threat or harm on evidentiary standards or procedural criteria. Further, WSPA believes that California's environmental programs are already based on an approach that adequately addresses risks to the environment by setting standards and regulatory mandates that use conservative assumptions, safety factors, and the use of good science.

In that regard, we believe the proposed draft 303(d) Listing Policy incorporates scientific based criteria which include such procedures as the weight of evidence approach, the binomial statistical method and other factors. This approach will ensure that listing determinations are based on credible evidence and data and will allow the SWRCB to allocate limited resources and funds to address those water bodies in need of immediate action.

In closing, WSPA would again like to thank you for allowing additional time to provide written comments. WSPA looks forward to continue working with you and your staff on the 303-(d) Listing Policy.

Should you have any questions, please don't hesitate to contact me at (916) 498-7753.

A handwritten signature in black ink, appearing to read "Stan Airt". The signature is fluid and cursive, with a long horizontal stroke at the end.

cc: Mr. Art Baggett – Chairman, SWRCB